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No. 96-599

Supreme Court, U.S.
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# In The Supreme Court Of The United States

**OCTOBER TERM 1996**

## THE GLENBROOK COMPANY,

*Petitioner,*

v.

## ERNST HOME CENTER, INC.,

*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals For The Ninth Circuit**

## REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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## I. INTRODUCTION.

The decision of the Ninth Circuit Court of Appeals directly conflicts with the authority of this Court which requires the application of the substantive law of the state governing attorneys' fees in diversity cases. Additionally, the decision of the Ninth Circuit directly conflicts with that of other circuit courts on the important question of how to determine the prevailing party for offer of judgment purposes. Finally, the Ninth Circuit's decision conflicts with decisions from other circuits in that the Ninth Circuit failed to apply the local rule of the district court directly applicable to this issue.

## II. THE NINTH CIRCUIT DECISION CONFLICTS WITH SUPREME COURT AUTHORITY.

This Court has held that the substantive law of the state governing the award of attorneys' fees must be applied in diversity actions unless that law is in direct collision with a federal rule. *Alyeska Pipeline Service Co. v. Wilderness Soc.*,

421 U.S. 240, 259, 95 S.Ct. 1612, 44 L.Ed.2d. 141, 154 (1975).

Ernst's contention that Federal Rule of Civil Procedure 68 directly collides with NRS 17.115(5) is groundless. Ernst's efforts to distinguish the holding in *Tanker v. Management, Inc. v. Brunson*, 918 F.2d 1524 (11th Cir. 1990) are equally groundless. The Court in *Tanker* held that a statute that concerns attorneys' fees, offers of judgment and settlement offers was not in direct conflict with Federal Rules 68 because that rule only covered interest and offers of judgment. Ernst attempted but failed to distinguish this case.

Ernst's position is especially groundless under the facts in this case. An offer of judgment that is made with costs incurred to date means that the offer is for the amount contained in the offer plus the costs accrued to date. *Marek v. Chesny*, 473 U.S. 1, 6, 105 S.Ct. 3012, 87 L.Ed.2d. 1 (1985); *Erdman v. Cochise County, Ariz.*, 926 F.2d 877, 879 (9th Cir. 1991).

The offer of judgment in this case was for $210,000 "with costs incurred to date." App. 15a. Thus, under Rule 68, the offer of judgment in this case "with costs incurred" to the date of the offer must be compared to the actual judgment with costs incurred to the date of the offer of judgment.[1] Since the "costs incurred" will always be the same in a given case (whether or not costs include attorneys fees), the heart of the question is whether the offer of judgment without costs is the same as the final judgment without costs. The offer of judgment in this case of $210,000 obviously exceeds the judgment of $175,617.12.

Under both NRS 17.115(5) and Local Rule 205-12, costs and attorneys fees are not considered in determining the prevailing party. This does not conflict with the federal rule when the offer of judgment is made "with costs incurred," as Glenbrook did in this case. The net effect under Federal Rule

[1]The rationale behind this argument and the points and authorities in support thereof is contained in Section III of this Reply below.

68, NRS 17.115(5) and Local Rule 205-12 will always be the same when an offer of judgment is made "with costs incurred." Thus, under the facts in this case, Rule 68, NRS 17.115(5) and Local Rule 205-12 are completely consistent and are definitely not in "direct collision." Therefore, the Ninth Circuit's refusal to apply the provisions of NRS 17.115 violated the requirement of *Alyeska Pipeline Serv. v. Wilderness Soc.*, 421 U.S. 240, 259, 95 S.Ct. 1612, 44 L.Ed.2d. 141, 154 (1975).

## III. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THE DECISION OF OTHER CIRCUIT COURTS.

Ernst's argument is based upon the assumption that it is not necessary to compare like "judgments." Ernst misconstrues *Marryshow v. Flynn*, 986 F.2d 689 (4th Cir. 1993) and *Grosvenor v. Brienen*, 801 F.2d 944 (7th 1986). *Marryshow* states as follows:

> Rule 68 requires that a comparison be made between an offer of judgment that



> includes "costs then accrued" and the "judgment finally obtained." It is neither logical nor consistent with the rule and applicable authority to compare an offer of judgment which includes all costs, including attorney's fees, and a judgment finally obtained which includes no costs. To make a proper comparison between the offer of judgment and the judgment obtained when determining, for Rule 68 purposes, which is the more favorable, like "judgments" must be evaluated. Because the offer includes costs then accrued, to determine whether the judgment obtained is "more favorable," as the rule requires, the judgment must be defined on the same basis – verdict plus costs incurred as of the time of the offer of judgment.

*Id.* at 692 (citing *Marek*, 473 U.S. at 7, 105 S.Ct. at 3015; *Grosvenor v. Brienen*, 801 F.2d 944, 948 (7th Cir. 1986).

A proper reading of *Marryshow* and *Grosvenor* demonstrates that Ernst's position is groundless. These cases require that like "judgments" be compared. In *Marryshow*, the offer of judgment was for $20,000.00 including costs, not plus costs as in this case. The offer in *Grosvenor* was similarly

inclusive of costs. In comparing like "judgments," the *Marryshow* court added pre-offer costs to the final judgment, and compared that figure with the offer of judgment alone since the offer "included" costs.

In this case, the offer of judgment was $210,000.00 "with costs incurred to date." "With costs incurred" means "plus 'costs then accrued . . . .'" *Marek v. Chesny*, 473 U.S. 1, 6, 105 S.Ct. 3012, 87 L.Ed.2d 1 (1985). Thus, in order to compare like judgments, the Ninth Circuit was required to add to the final judgment the pre-offer costs, and compare that figure to the offer of judgment together with the pre-offer costs. The Ninth Circuit failed to do so, contrary to the decisions of this Court and other circuits.[2]

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[2]Ernst's contention that this procedure is nonsensical is remarkable. This "nonsensical" procedure is what is expressly required by decisions of the Fourth and Seventh Circuits. Furthermore, it is not nonsensical. When an offer of judgment is made "with costs incurred to date" it is the only way to fairly compare the offer with the judgment. Conversely, when an offer of judgment is made in an amount that is expressly inclusive of costs, then the offer of judgment must be compared with the judgment plus the pre-offer costs to make a fair comparison. There is nothing nonsensical about these procedures.

## IV. GLENBROOK'S OFFER OF JUDGMENT WAS VALID.

Ernst's alternative argument that even if the Ninth Circuit erred, that its decision was still correct because the offer of judgment was not binding is utterly astounding. To support its position, Ernst relies on that part of the Ninth Circuit's original decision that was withdrawn as a result of the Petition for Rehearing.

In the Petition for Rehearing, Glenbrook argued that the record clearly showed that: (1) The District Court had determined that Ernst did not validly accept the offer of judgment, not that Ernst had accepted the offer; and (2) The District Court concluded that the settlement, i.e., the offer and the acceptance, was not binding, not that the offer itself was not binding. In modifying its Decision in response to the Petition for Rehearing, the Ninth Circuit accepted these contentions and then analyzed the question of whether or not to apply NRS 17.115(5) to the facts of this case. As discussed above, the

Ninth Circuit improperly found NRS 17.115 to be inapplicable and furthermore failed to even properly apply the federal rule when it failed to compare like judgments. The Ninth Circuit has thus established a different federal procedure than that employed by other circuits. If the offer of judgment was not binding, then the Ninth Circuit would never have gotten to the issue of the applicability of NRS 17.115.

## V. THE NINTH CIRCUIT FAILED TO APPLY LOCAL RULE 205-12

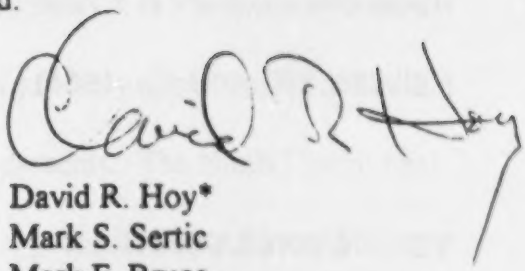
Ernst's brief in opposition does not address the Ninth Circuit's failure to apply Local Rule 205-12, which is identical to NRS 17.115(5). The only conclusion which can be drawn from Ernst's non-opposition is that Ernst concedes the argument to Glenbrook. Local Rule 205-12 provides that costs and attorney's fees should not have been included in determining the prevailing party, thereby entitling Glenbrook to attorney's fees and costs in this case. The Ninth Circuit's failure to apply this local rule conflicts with the law of other circuits. See, e.g.,

*Woods Construction Co. v. Atlas Chemical Industries, Inc.*, 337 F.2d 888, 890 (10th Cir. 1964).

## VI. CONCLUSION

The Decision of the Ninth Circuit conflicts with the decisions of this Court and the decisions of other circuits concerning the applicability of state substantive law governing attorney's fees awards in diversity cases. Additionally, the Ninth Circuit's decision is in direct conflict with the decisions of other circuits as to the proper method of determining the prevailing party when an offer of judgment is made. For these reasons, a writ of certiorari should be issued by this Court to the Ninth Circuit Court of Appeals.

Respectfully submitted.



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